No. 7466.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

Alfred G. Wilkes, E. Byron Siens, John McKeon, Robert McKeon, Maurice C. Myers, William J. Cavanaugh, Fred Shingle and Horace J. Brown,

Appellants,

vs.

United States of America,

Appellee.

REPLY BRIEF OF APPELLANTS FRED SHINGLE AND HORACE J. BROWN.

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Due to the fact that appellee in its brief asserts that appellants have erroneously stated the record, did not reserve proper objections and exceptions in many instances, and appellee has applied correct rules of law to inapplicable statements of fact and has in many instances been guilty of an erroneous statement of the record, we are constrained, in order to lighten the burdens of this court, to call these matters to the court's attention.

I.

Inaccuracies in Appellee's Statement of Facts.

1. Italo American Did Not Improperly Pay Dividends as Asserted in Appellee's Brief, Page 4.

The record, page 211, shows (a) that in the year 1925 Italo American had a profit before deduction of dividends of $29,775.69. A dividend was declared April 15, 1925 [R. 192].

(b) For the first six months of the year 1926 Italo American had a profit of $30,948.02. The last dividend declared that year was payable the 1st day of June, 1926, as evidenced by Exhibit 3, page 77. The loss incurred in 1926 was over the whole year's operations, but when the dividend was declared there was a substantial profit, and no dividends were declared or paid during the last half of 1926 or during the year 1927 (Exhibit 3). Since Italo American was a corporation engaged solely or substantially in the exploitation of oil and gas wells, and having wasting assets, it could under the law distribute its net income without making any deduction or allowance for depletion of such assets due to consumption or exploitation, and the court so instructed the jury. [R. pp. 1292-1293; *Cal. Civ. Code*, Sec. 346; *Excelsior Water & Min. Co. v. Pierce*, 90 Cal. 131 at pp. 140 to 142.] Therefore this charge of the indictment was not sustained by the evidence, and the statement that the Italo American was continually in a morass of financial difficulties from its incorporation is incorrect.

2. Wilkes' Testimony Relative to Value of Brownmoor Assets Incompletely Quoted.

The statement on page 10 of appellee's brief "that Wilkes was not very much impressed with any of the (Brownmoor) properties except the refinery" should be supplemented by the remainder of that sentence "but I knew of their property on the Kern River Front which Mr. McKeon and Mr. Cavanaugh had told me about. I later got Masoni and went to Bakersfield and looked over those properties on the Kern River Front. It appeared to us to be a very attractive property, three little producing wells at that time, they were just about to complete three more," and by the further testimony along these lines appearing on pages 694, 695 and 696 of the record disclosing that Wilkes thought that the refinery and the Kern River Front property were valuable and caused Dr. Starke to make an appraisal thereof which he did with the result that the property was appraised at $4,225,835.00. [R. p. 705.]

3. Inaccurate Statements of Sales Prices of Stock Purchased by Big Syndicate.

The statement in appellee's brief, pages 28 and 29, to the effect that the three million units of stock purchased by the Big Syndicate for $3,500,000 or $1.16⅔ per unit and that "this syndicate the very next day turned around and authorized Vincent & Company to sell 500,000 units of these 6,000,000 shares at a minimum gross price of $2.00 per unit, less 20% commission" or net $1.60 to the syndicate leaves the inference that these were simultaneous transactions. From this erroneous statement, appellee at page 133 argues that the Italo stock was purchased by the Big Syndicate at a time when it was being

sold to the public at a price of $2.00 to $2.50 per unit, and then asserts at page 230 that the court did not err in refusing a requested instruction to the effect that there was no presumption that the par or face value of the stock was its actual value.

The above statements leave a misleading situation. The letter quoted on page 27 of appellee's brief (Exhibit 145) is dated June 14, 1928 [R. 384-5]. The first Big Syndicate agreement is dated June 18, 1928, and the second July 12, 1928 (Exhibit 280). The price of $1.16⅔ per unit was therefore agreed upon on or about June 18, 1928 when the syndicate agreement was made and executed [R. p. 900]. In this connection the defendant Shingle testified:

> "With reference to the appraised value of the properties, we were told about what they would run, and we later saw the actual appraisements. Computations were made as to the price which the proposed transfers would reflect for the stock of the Italo Petroleum that would be issued. There was considerable discussion on that between Brown, myself and Wilkes. We were trying to arrive at a fair price which the company should get, and also a fair price which the syndicate should give. The only basis we had to go by was the last sale of stock which the company had made practically a month previously to Vincent & Company, *whereby they had a contract, but not a commitment*, to purchase Italo units at $1.50 a unit, less 15 per cent, which would mean $1.27½ net to the company. Wilkes was quite anxious to have the syndicate pay as close to that price as possible. Brown and myself, on the other hand, took this position: that inasmuch as the company was getting these properties at a cheap price according to his statement, that the syndicate on the other hand

should have some advantage of that purchase also, and as I remember I think we started out at around $1.00 per unit that the syndicate could pay for the stock, *for the reason that the syndicate would be buying 3,000,000 units of stock which would be paid for over comparatively a short period of time, whereas Vincent was paying $1.27½, and he could come in and buy one unit at a time or not buy any.* After several discussions we arrived at a price of $1.16⅔ per unit, which we considered fair to the syndicate, and Wilkes considered fair for the company." [R. 903-904.]

The price of $1.16⅔ was therefore agreed upon before the McKeon and Graham-Loftus and other valuable properties were finally acquired [R. 904-906]. The McKeon-Italo contract was executed July 5, 1928 (Exhibit 44) and it and the other contracts to acquire properties were subject to the approval of and issuance by the Corporation Commissioner of a permit which was issued August 9, 1928. On the other hand the contract with Vincent, whereby Vincent obtained *an option to buy* (but was not committed to do so as the syndicate was) 500,000 units of stock net $1.60 to the syndicate was not executed until August 18, 1928, *two months* after the absolute syndicate commitment to buy 3,000,000 units at a price of $1.16⅔ was made.

At the time the syndicate commitment agreement was made June 18, 1928, Italo had only acquired the Brownmoor properties, although it was then known that other valuable properties would be acquired and the acquisition financed by the syndicate, so far as cash payments were concerned. When Vincent obtained his option August 18, 1928, these transactions had been consummated and

the permit issued by the Corporation Commissioner. Between June 18, 1928, and August 18, 1928, the syndicate had raised $1,911,375. [R. 919; R. 933.] These facts were material in considering the price at which the stock was optioned to Vincent. We all know that in a period of two months during the summer of 1928 the price of stocks fluctuated, usually upwards.

On June 18, 1928, the Italo stock was not listed on the Stock Exchange. It was listed at or about the time the Vincent option was given. [R. 911.] In the above quotation of the testimony of the appellant Shingle as to how the price was arrived at that the syndicate should pay for the stock, reference was made by the witness to the prior sales to Vincent & Company at $1.27½ net to Italo. This Vincent subscription to acquire 300,000 units of Italo stock at $1.27½ per unit net to the company, is dated May 10, 1928 [Exhibit 137; R. 376] and under the subscription Vincent subscribed for only 300,000 units which he could take piecemeal. The only other large sale of stock which could afford light on the proper price the syndicate should pay was on May 31, 1928, when Vincent bought 240,000 units from Siens, Shores and Westbrook for $288,000 or $1.20 per unit [Exhibit 151; R. 391.] It is obvious from the above that when the syndicate agreement was made June 18, 1928, and the price agreed upon, the price at which the stock was sold months later could not be used as a basis and that it was necessary to consider sales of large blocks of stock made at or about June 18th or prior thereto. When the fact is considered that 3,000,000 units *were purchased and not optioned* it must be conceded that the price was a fair one. The foregoing summary is deemed necessary lest the

court be misled and may be considered as an answer to the argument of appellee in its brief, page 230, that the facts referred to by him by reason of the price differential constituted a fraud.

4. Appellee's Erroneous Statement to Appellants' Explanation of Receipt of McKeons' Stock.

The statement on page 56 of appellee's brief that one reason the stock paid by the McKeon Drilling Company to Shingle, Brown & Company was, according to Shingle's testimony, the deposit of 2,000,000 shares of syndicate stock as collateral for the bank loan with the Farmers & Merchants National Bank is without foundation. No such claim was made by Shingle. The reasons given by Shingle and Brown for the payment of this stock are summarized in our opening brief pages 59 to 68. They are in substances as follows:

First: It was paid in consideration of valuable services rendered and moneys expended for expenses in financing the acquisition of the properties and saving the company from losing the properties and the moneys paid on account for them, and these services were rendered necessary *because and only after* Vincent had failed to perform the same services (for which Vincent's failure he received 250,000 shares of the stock).

Second: Because the commitment to finance one-half of the $10,000,000 bond issue was to be without compensation to Shingle, Brown & Company [See also McKeon Brief, pp. 187-195 and R. pp. 922, 935 and 1005].

5. Appellee's Erroneous Statement Relative to Affidavit of Personal Bias and Prejudice.

Appellee states at page 67 of its brief "that the cause was on January 17, 1933, set for trial before Judge Cosgrave for May 2, 1933 [R. 166]." This statement is erroneous. The record [p. 160] is as follows:

> "Thereafter, and on September 19, 1932, the defendants . . . entered their pleas of not guilty to each and every count of the indictment, and the said cause was set for trial *for January 17, 1933, before the Hon. Paul J. McCormick, judge of the above entitled court.* On January 17, 1933, the said cause was continued for the term for setting, *and on the term day, to-wit, February 6, 1933, the said cause was transferred to the court of the Honorable George Cosgrave,* judge of the above-entitled court, who, on said date set said cause for trial for May 2, 1933, and on April 14, 1933, continued the said trial to May 16, 1933, and on May 9, 1933, the said trial date was continued to May 23, 1933."

Appellee, based on this erroneous assumption of facts, at page 70 states "It is pertinent to inquire why he didn't file this affidavit when the case came up before Judge Cosgrave on January 17, 1933." The answer is clear. The case was not pending before Judge Cosgrave on January 17, 1933, and therefore the affidavit could not have been filed against him ten days prior to the beginning of the February term because the case was not transferred to Judge Cosgrave until February 6, 1933. For this reason the provision of the statute requiring the filing of the affidavit ten days before the beginning of the term in which the trial is to be held could not have been complied with. It was not sought to disqualify Judge Mc-

Cormick but to disqualify Judge Cosgrave for personal bias and prejudice. The argument of appellee that the affidavit was filed late therefore falls because of the erroneous assumption of what the record shows. The affidavit itself, as will be pointed out by other appellants, shows that the facts were not known to the appellant Siens until a few days prior to the filing of the affidavit. The court did not disallow the affidavit upon the grounds that it was filed late, and therefore must have determined judicially that it stated sufficient facts to constitute an excuse for the late filing.

II.

Proper Objection Was Made to the Introduction of Corporate Books and Records.

Appellee in its brief, pages 87 to 100, attempts to summarize the various foundation evidence respecting the admission of the books and records of the Italo American Petroleum Corporation, Italo Petroleum Corporation of America, Shingle, Brown & Company, Brownmoor Oil Company and the Bacon & Brayton account with Wilkes-Cavanaugh, and also makes reference to the books and records of the corporation known as John McKeon, Inc., and those of the McKeon Drilling Co., Inc.

1. The Italo American minute book was objected to upon grounds, among others, that "no foundation laid" [R. 192]. This was a sufficient objection.

2. The records of John McKeon, Inc., and McKeon Drilling Co., Inc., were erroneously admitted as to these appellants because the proper foundation was not laid. Appellee's brief, page 97, asserts that no outline as to the foundation testimony was given as to the books and

records of these concerns. On page 132 of our opening brief we referred to the testimony of D. C. Taylor and E. A. Thackaberry appearing in the record [R. 319 and 360, respectively], showing that neither of these persons had ever given Shingle or Brown any information concerning the entries in the McKeon books. Since no foundation was laid as to these books we could only refer the court to the record showing affirmatively that the foundation was not laid. On page 133 of our opening brief we called attention to the fact that the records of John McKeon, Inc., were admitted, although there was no showing made that Shingle or Brown had knowledge of the contents thereof [R. 479-480]. The records of John McKeon, Inc., were not, as stated by appellee, the records of the large corporation which was to take over the assets of Italo, but were the records of a private corporation of the appellant John McKeon.

3. Foundation evidence respecting books of account of Italo American, Italo Pete, Brownmoor, McKeon Drilling Co., Inc., Bacon & Brayton with Wilkes-Cavanaugh partnership and Shingle, Brown & Company.

Appellee, in its supplement to appellants' outline of the foundation evidence respecting the books and records of Italo American, Italo Pete, Brownmoor, McKeon Drilling Co., Inc., John McKeon, Inc., Bacon & Brayton and Wilkes-Cavanaugh partnership (appellee's brief, pages 88 to 94 and 95-96), does not point to any evidence showing that either Shingle or Brown had knowledge of or access to, or directed the making of any of the entries in said books and records. Our opening brief, pages 84 to 89, specified the assignment of error respecting these records, and at pages 127-134 we summarized the evidence of the

identifying witnesses to supplement the McKeon summary, pages 252 to 286, for the purpose of showing that the evidence not only failed to show the requisite foundation but affirmatively established that neither Shingle nor Brown had knowledge of the entries in said records. We shall therefore assume that our summaries were correct.

Shingle, Brown & Company was a corporation operated by the defendants Shingle, Brown, Jones and Mikel until January 2, 1929, when a partnership was also formed [R. 447]. The major part of the evidence in the case with respect to Shingle and Brown began with the $80,000 loan syndicate in April or May, 1928, and ended with the completion of the syndicate December 22, 1928. The McKeon brief (page 261 *et seq.*) summarizes the foundation evidence respecting the Shingle, Brown & Company books and records and points out that the foundation witness was L. J. Byers, who was first employed by this corporation August 1, 1928, and admitted that he had no knowledge of any entries dated prior thereto (which includes all transactions relative to the $80,000 loan, the $83,000 check in the Montgomery Investment Company account and the Brownmoor transaction) and of many entries after that date. Nevertheless on this foundation evidence the records were received in evidence against all defendants over objection. Appellant Shingle testified respecting his knowledge of the books and records of Shingle, Brown & Company as follows: "I do not know anything about the bookkeeping records of Shingle, Brown & Company," and again "I would be glad to answer that, but I know nothing about bookkeeping" [R. p. 938].

4. The books and records of the corporations other than Shingle, Brown & Company were inadmissible against

these appellants because a sufficient foundation was not laid for their admission.

Appellee presents several reasons for admission of all of the corporate records objected to as against all appellants. These reasons are summarized and the answers thereto set forth as follows:

(1) Appellee asserts that the proper foundation was laid. In this connection appellee makes no effort to show that the objection on the ground of lack of proper authentication was not well taken, but asserts that "these books were all available to the defendants and if not correctly kept they could very easily have determined that fact" (appellee's brief, page 107). Such is not the rule. The rule requires that before private books can be admitted in evidence over the objection of the opposing party some evidence must be introduced as to their trustworthiness and the proper foundation laid. (See *Phillips v. United States,* 201 F. 259, and other cases cited in our opening brief.)

(2) Appellee asserts that the records are admissible in evidence because the proper foundation was laid in that there was a sufficient showing of knowledge of and familiarity therewith on the part of these appellants and argues as follows:

(a) That the Italo American records are admissible *against appellants Shingle and Brown* because Perata and Masoni were officers of that company, and Perata gave some instructions to employees.

(b) That the Italo Pete minute books were admissible, because McLachlen kept the minutes from and after April 18, 1929, and those minutes were approved and passed on by Robert McKeon and Myers and the signature of

some of the defendants (other than these appellants) appeared in said minutes. It is conceded Shingle and Brown knew nothing of the contents of said minutes.

(c) That the Italo Pete books of account are admissible because the bookkeepers worked under the defendant Lyons' supervision. The defendant Lyons was dismissed as a defendant on the government's own motion at the conclusion of its case in chief for insufficient evidence [R. 686]. Appellee further argues that said records are admissible because some information had been given from said books to defendants other than Shingle and Brown and because other defendants were officers or directors of the company.

(d) That the Bacon & Brayton records were admissible because Wilkes and Cavanaugh were partners of the company which had the records.

(e) That the Brownmoor records were admissible because Siens was president and Shores and Westbrook, two acquitted defendants, officers and directors thereof.

(f) That the McKeon Drilling Co. records were admissible because Robert and Raleigh McKeon were officers and John McKeon a director thereof.

(g) That the records of John McKeon, Inc., were admissible because it was this company which was to take over Italo. This assumption is unwarranted. The fact is that this was a private corporation or holding company of John McKeon.

From the above arguments appellee concludes that because *some defendants* were connected with one corporation or another, and *some defendants* with another corporation, and so on, that the books and records of those

corporations were admissible against appellants Shingle and Brown, who were not connected with the said corporations and who had no knowledge whatsoever of the contents of their records. By this clouding of the issue appellee makes the argument, commencing on page 100 of its brief.

The cases of *Worden v. United States, People v. Doble, Chaffee & Company v. United States* and others cited in our opening brief (pages 134 to 144) and in appellants' McKeon brief (pages 252 to 275) are directly in point.

The contention that because Lyons was a defendant and supervisor of accounts of Italo that the records should be admitted against all defendants should never be countenanced. Lyons was dismissed upon motion of the government at the conclusion of the government's case in chief for insufficient evidence after he had been kept under the shroud of an indictment for eighteen months and had been compelled to retain counsel and stand trial [R. 686]. This was a reprehensible procedure. The government in such cases knows its evidence when the indictment is returned. To follow this argument to its logical conclusion all a prosecutor need do is to indict the supervisor of accounts of a corporation, introduce the corporate records in evidence against *other defendants* upon the assertion they are admissible because kept by the supervisor defendant and then dismiss the indictment as to him for evidence which the prosecutor knew was insufficient. If the admissibility of the records depended on Lyons the foundation fell when he was dismissed. The rule contended for by appellee would wipe out all constitutional safeguards to the American liberty of individuals.

The cases cited by appellee in its brief (pp. 100 to 104) were cases in which it was held that under the facts shown the defendants had sufficient knowledge of and familiarity with the records to justify their admission in evidence. Here we have shown the absolute lack of foundation with respect to such knowledge and familiarity insofar as these appellants are concerned.

(3) Appellee asserts that the books and records of the corporations were admissible to show the business transactions of the various companies. What business transactions? How could the business transactions of third-party corporations be admissible against Shingle and Brown, who had nothing to do with them? The *Lewis*, *Barrett* and *Butler* cases cited by appellee were cases involving corporations with which the defendants were connected. One of the issues involved in those cases was with respect to the financial condition of the company. Here that issue was not involved, but it was sought to prove a specific charge, involving the alleged secret profits. Under the very authorities cited by appellee the proper foundation was not laid.

(4) Appellee contends that the corporate records were admissible against Shingle and Brown as admissions against interest.

It is clear from the cases heretofore cited that book entries may be admissible if a proper foundation is laid as admissions of the corporation whose books they are, but they cannot be admissions of third parties who had no knowledge of the contents of those books. The cases above referred to and cited in our opening brief dispose of this argument. *The books of parties to litigation may*

Siens was president of the Brownmoor Oil Company and two other acquitted defendants were officers or directors. The defendants McKeon were connected with the McKeon Drilling Co., Inc., and the Wilkes-Cavanaugh partnership was composed of the two appellants Wilkes and Cavanaugh. Since, however, neither Shingle nor Brown had any connection with these corporations, it is obvious that the rule enunciated in the *Cullen* case does not apply to the facts in this case. This argument might be sufficient as a justification for the admission in evidence of the books and records of Shingle, Brown & Company against these two appellants but certainly not the books and records of the other corporations.

(7) It is finally argued by appellee that the books and records were admissible under the rule that the acts and declarations of a party are admissible against co-parties during the existence of the alleged scheme or conspiracy. This rule is restricted in its application to the acts or declarations of a party to the action. Here the corporations were not parties. (See *Worden v. United States, supra.*) Hence these acts and declarations were acts of third parties or strangers to the record and not acts or declarations of parties. Here there was no act, no declaration. Mere inactivity or passiveness is not a sufficient act or declaration to constitute a party to a conspiracy. (*Wineger v. United States*, C. C. A. 9 (47 F. (2) 692.)

For the foregoing reasons we respectfully reassert our contention that the books and records of the various corporations were improperly admitted in evidence against these appellants.

III.

The Summaries Exhibits 297 and 299 Prepared by the Witness Goshorn and His Testimony Relative Thereto Were Erroneously Received in Evidence.

1. That the conclusions of the witness Goshorn that the stock listed on Exhibits 297 and 299 was "bonus" or "commission" stock, were entirely unjustified by the evidence is clearly pointed out in appellants' opening brief. Appellee asserts that "the witness merely undertook to testify what was disclosed by the books and records he examined". On *voir dire* and cross-examination the witness Goshorn was compelled to admit that the term "bonus" was his own conclusion and designation and did not appear in the books and records examined by him. (See summary of evidence McKeon brief, pp. 291 to 318.) Obviously therefore the witness was not testifying to what was disclosed by the books and records he examined in designating this as "bonus" stock. Although after objection made the court agreed to change the word "bonus" to "commission" the change was never made. [R. 595 to 603.] The only justification urged for changing "bonus" to "commission" was because the word "commission" was used in one instance by the auditor Lyons in the McKeon books. It did not appear in any of the other books and records in evidence [R. 646 to 647], and yet the charts were admitted as against all defendants, although not based upon records of these appellants, with respect to the terminology "bonus" or "commission".

The value of cross-examination was clearly demonstrated in this instance. Although Goshorn had testified that the summary "reflected" the disposition of the stock and "reflected" the money "realized" by defendants, based

upon the books and records in evidence, on cross-examination he was compelled to admit that the books did not "reflect" the stock was "bonus" or "commission" stock, and further that the summaries reflected his conclusion of the truthfulness of Stratton's testimony. (See references in opening brief, *supra.*)

2. Appellee next asserts that the use of the term "bonus" on Exhibit 299 was permissible because some of the defendants in their testimony referred to the 80,000 shares of stock as a bonus. What the defendants may subsequently have called this stock is immaterial. The point is that the witness was not testifying as to what the books and records disclosed. He admitted that the Italo books disclosed that *Italo* never paid or delivered 80,000 shares of stock as a "bonus" or "commission" or otherwise [R. pp. 649 and 651 to 652], and the District Attorney stipulated that the contract (Exhibit 142) did not provide for the payment of any bonus stock or any other bonus. [R. 649.] Had the witness Goshorn therefore testified to what the books and records "reflected" and had he so listed the matters upon the said exhibits, his testimony would have been that the Italo repaid the syndicate the $80,000 loan with 7% interest. [R. 649.] This he was compelled to do on cross-examination, but only after the damage had been done and counsel were compelled to draw this admission from him on cross-examination where he testified [R. 676]:

> "Referring to Government's Exhibit 299, line 2, I state, 'Bonus given to members of the $80,000 syndicate,' *the expression 'bonus given' is my conclusion. The books and records do not disclose the word 'bonus' and do not disclose whether it was given or not.* The books say it is a part of the consideration for the $80,000."

3. Goshorn's unwarranted conclusions set forth on this chart that the appellant Brown paid $2500 to the syndicate and "realized" 1250 units of stock therefor were not "reflected" by the books and records. [R. 652-653.]

4. *The charts, Exhibits 297 and 299,* and the oral direct examination (which was nothing but a reading of the charts) *were clearly inadmissible as the conclusions of the witness, because based upon the assumed truthfulness of the testimony of the witness Stratton,* which was disputed and clearly shown to be fabricated.

(a) The opening brief of appellants McKeon (page 317) points out that the item on Exhibit 297 relative to "market losses" was not based on what "the books and records reflected", but upon the testimony of the witness Stratton. [R. 616-617.]

(b) Item 11 of Exhibit 299 showing 230,000 units of Italo stock going to Fred Shingle and that these appellants (Item 1) realized $83,000 from the disposition of that stock is likewise not based upon what the books and records in evidence "reflected" *but upon the assumed truthfulness of Stratton's testimony.*

In our opening brief, pages 18 to 32, we pointed out that although Stratton *claimed* that Frederic Vincent & Company had purchased these 230,000 units through Shingle, Brown & Company, and paid $83,000 as part consideration therefor, his evidence was clearly repudiated by his own evidence that he had already bought and paid for this stock and Exhibit E in his own handwriting showing this fact.

The cross-examination of Goshorn [pp. 654 to 656 of the record] clearly demonstrates that *nowhere in the books*

and records in evidence was there any entry disclosing that Frederic Vincent & Company had purchased this 230,000 units from or through Shingle, Brown & Company, or that the $83,000 was a part of the purchase price thereof. A reference to those portions of the record will show that Goshorn admitted on cross-examination that the books of Shingle, Brown & Company did not disclose the receipt by that company or by Fred Shingle of the 230,000 units of stock or any confirmation of any sale of that stock by that company. He further admitted that those records did not disclose the receipt of $83,000 in part payment of that stock. Nevertheless he had indicated on his chart and testified that the $83,000 was in part payment of these 230,000 units of stock. That this evidence was based solely on the assumed truthfulness of the testimony of the witness Stratton is admitted by the witness on redirect and recross-examination as follows [R. 677]:

> *"Those checks were issued in payment for stock which Frederic Vincent & Company purchased,* which stock stood in the name of Fred Shingle for 230,000 units, that being the 230,000 units that is set forth on line 11 of Exhibit 299.
>
> Mr. Simpson: I move that that be stricken out as an opinion and conclusion of the witness. *He has already testified to the contrary, that he did not know whether Frederic Vincent & Company bought the stock or not.*
>
> The Court: The witness may explain.
>
> A. The checks issued to the Montgomery Investment Company, I believe, *were testified to by Mr. Stratton, that it was in connection with the deal which he had with Mr. Wilkes in the selling of this particular stock in the name of Mr. Shingle.* The checks are

endorsed 'Montgomery Investment Company', and likewise 'Shingle, Brown & Company', and are carried as credits to the account of Montgomery Investment Company in the Shingle, Brown & Company records. The account of Montgomery Investment Company shows on June 18th—

Mr. West: Your Honor, I would like to move to strike that portion of the witness' testimony out wherein he professes to give a construction of Mr. Stratton's testimony. He was not examined either in examination in chief or on cross-examination on that particular subject.

The Court: Denied.

Mr. West: Exception."

[R. 678, 679]: "Q. Mr. Goshorn, I want you to show me any book and record which is here in evidence that shows that Frederic Vincent & Company purchased from Fred Shingle or from Shingle, Brown & Company the 230,000 units of the Italo Petroleum Corporation of America stock which you referred to on Exhibit 299. A. Those checks to the Montgomery Investment Company.

Q. Do those checks show that they were in payment of that 230,000 units of stock? A. *The checks themselves do not show it, no.*

Q. Well, *where is any record in evidence here to show that Fred Shingle or Shingle, Brown & Company sold that 230,000 units of stock to Frederic Vincent & Company?* A. *The certificates themselves are made to Mr. Fred Shingle.* I believe they bear his endorsement, and the Italo stock transfer records then show that the transfer from those certificates was made under the direction of Frederic Vincent & Company.

Q. Now will you answer my question? A. I am trying to.

Q. Where is any record in this evidence that Frederic Vincent & Company bought or purchased those 230,000 units of stock from Fred Shingle or Shingle, Brown & Company? Is that what you base your testimony on that Frederic Vincent & Company bought those units of stock from Fred Shingle? A. Yes, sir.

Q. But there is no record in the records of Fred Shingle, the Montgomery Investment Company or Shingle, Brown & Company of the confirmation of any sale of that stock to Frederic Vincent & Company, is there? A. No, sir.

Q. And there is no record in those books of those persons and corporations showing that Fred Shingle or Shingle, Brown & Company or the Montgomery Investment Company ever received those shares of stock, is there? A. Not the stock, no, sir." [R. 679.]

In our opening brief we summarized the evidence relative to the Brownmoor purchase and clearly pointed out wherein the assertion of Stratton and Vincent that they purchased this 230,000 units of stock of Brownmoor through Shingle, Brown & Company was a disputed fact in the case and that the truthfulness of Stratton's testimony was rebutted by his own evidence, the documents received in evidence, and the testimony of defendants respecting the same. (See opening brief, pp. 18 to 32.) The substance of the evidence is that Frederic Vincent & Company had already bought and paid, or contracted to pay, for this stock and would, therefore, not be buying the same stock again.

It must be apparent from the foregoing quotations that Exhibits 297 and 299 are in part based upon the assumed truthfulness by the witness Goshorn of Stratton's testimony. That such evidence was improperly admitted is established by recent decisions of this court.

In the case of *United States v. Stephens,* 73 F. (2) 695, this court reversed the case for the erroneous admission of evidence which called upon an expert to determine the credibility of other witnesses in the case and pass upon conflicts in evidence because it invaded the province of the jury. At page 703 this court said:

> "A hypothetical question which calls upon a witness to determine the credibility of other witnesses or to pass upon conflicts in the testimony invades the province of the jury, whose duty it is to determine where the truth lay in cases of conflicts in the evidence. Dexter v. Hall, 15 Wall. (82 U. S.) 9, 21 L. Ed. 73; Jones on Evidence, vol. 2, sec. 372; Estate of Gould, 188 Cal. 353, 205 P. 457; 22 C. J. sec. 807, p. 720. As stated in Jones on Evidence, vol. 2, sec. 372:
>
> * * * All question calling for their (expert) opinion should be so framed as not to call upon them to determine controverted questions of fact or to pass upon a preponderance of testimony. * * * When the question is so framed as to call upon the expert to determine as to which side of the evidence preponderates, or to reconcile conflicting statements, he is in effect asked to decide the merits of the case which is a duty wholly beyond his province. * * *

This doctrine was reaffirmed by this court in the recent case of *United States v. Sullivan,* 74 F. (2) 799, and by the United States Supreme Court in the recent case of

United States v. Spaulding, decided January 7, 1935, 79 L. ed. Advance Opinions, page 251 at 256, where the court said:

> "Moreover that question is not to be resolved by opinion evidence. It was the ultimate issue to be decided by the jury upon all the evidence in obedience to the judge's instructions as to the meaning of the crucial phrase and other questions of law. The experts ought not to have been asked or allowed to state their conclusions on the whole case."

We think, therefore, that the objections interposed to the admission in evidence of Exhibit 297 upon the grounds, among others, that the items therein set forth were conclusions of the witness and called for his conclusions both as to law and fact and that no proper or sufficient foundation had been laid to make any of such conclusions of either law or fact proper or binding upon any parties to this action [R. 591, 592 and 599, and 600] should have been sustained, for this objection to the whole exhibit was reiterated as to all questions asked concerning it. [R. 600.] The same objection was in substance made to Exhibit 299 [R. 631-632 and 635] and the motion to strike this evidence should have been granted. [R. 677.]

Although the decisions in the *Stephens, Sullivan* and *Spaulding* cases related to hypothetical questions propounded to medical experts, the same rule is here applicable because the witness Goshorn attempted as an expert accountant to summarize what the books and records disclosed, and in so doing characterized certain matters which were not disclosed by the books and records, and admittedly based certain statements in his evidence and upon

such charts upon what the witness Stratton said and not upon what the books and records disclosed.

It is asserted by appellee in its brief (page 133) that no objection to the use of the word "bonus" in these exhibits as being prejudicial was made, and that no objection was made to the changing of the word "bonus" to "commission". The record [pp. 591 to 600] sets forth the objections made. Those objections were clearly sufficient without stating that the exhibit was prejudicial. It was when we were permitted to question the witness on *voir dire* and were about to make a motion to strike the characterization of the stock as "bonus" stock from the exhibit that the court in response to our suggestion or motion ordered the matters stricken from the exhibit. [R. 601.] It was therefore unnecessary to make a formal motion to strike. That we clearly objected to changing the word "bonus" to "commission" is demonstrated by the record, for when it was suggested that the designation be changed defense counsel objected "it should not be changed to anything" and "I think it is just as objectionable as bonus". [R. 602-603.]

It was not necessary to specify that the evidence was prejudicial for a general objection on the ground that the evidence is incompetent, irrelevant and immaterial includes an objection that it is prejudicial.

> *Glenn Falls Insurance Co. v. Bundy,* 39 S. W. (2) 628, Court of Civil Appeals, Tex.

For a summary of the objections to the use of the word "bonus" on these charts, see the brief of appellants McKeon, pages 294 to 295.

Appellee argues that the evidence contained on these charts was admissible because it was later substantiated in part by the defendants. The answers to this are: First, the objection was not waived, nor the error cured by reason of the defendants introducing evidence in their own behalf. In *Jones Evidence in Civil Cases,* sec. 894, page 1414, the rule is stated:

> "Where the court has permitted a party to introduce incompetent evidence, over objection and exception, the party injured thereby may, without waiving his rights, rebut such evidence."

A party does not waive his right to urge exceptions to evidence admitted over his objection, by cross-examination of a witness on the matter objected to or by introducing evidence to explain or contradict it.

16 *C. J.* 885, sec. 2218.

In the case of *Salt Lake City v. Smith,* 104 F. 457 at 470 the Circuit Court of Appeals for the Eighth Circuit said:

> "Another contention is that counsel for the city waived their objection, because, after it was offered, and after they had taken their exception, they permitted the testimony of other witnesses to be read without objection, and because in the proof of their defense they availed themselves of the same class of testimony. *But the single objection which they made, and the single exception which they took, presented the entire question of the introduction of this hearsay testimony, and elicited a ruling of the court upon it which was conclusive and controlling at that trial of this case. There was no reason or call for fur-*

ther objections to evidence of this character, and their only effect would have been to annoy the court and to delay the trial. When a question has once been fairly presented to the trial court, argued, and decided, and an exception to the ruling has been recorded, it is neither desirable nor seemly for counsel to continually repeat their objections to the same class of testimony, and their exceptions to the same ruling which the court has advisedly made as a guide for the conduct of the trial. Counsel for the city lost nothing by their failure to annoy the court by repeating an objection which it had carefully considered and overruled. *Nor did they waive this objection and exception by introducing in defense of the suit evidence of the same character as that to which they had objected, and which they had insisted was incompetent. They had presented their view of this question.* They had objected to hearsay testimony, and had excepted to the ruling which admitted it. *They had not invited the error of that ruling, but had protested against it. This was all that they could do. The plaintiffs had induced the court to commit the error, and were thereby prohibited from availing themselves of it in any court of review.* Under this error they established their case by hearsay. Were counsel for the city required to refrain from meeting this proof by evidence of like character, under a penalty of a loss of their objection and exception? By no means. They had presented to the court and argued what they deemed to be the law. The court had held that they were in error; and it was the part of prudence and their duty to their client and the court to produce all the evidence which they could furnish in support of their demands, under the rule which the court announced, firmly but respectfully

> preserving their right to reverse the judgment if they failed to win their suit under the erroneous rule which the court had established. If they succeeded and obtained a verdict. the plaintiffs could not complain of the error which they had themselves invited, and the defendant's case would be won. If they failed, they would in this way preserve, as they had a right to do, the right of their client to the trial of its case according to the statute and the established rules of evidence, of which the erroneous ruling had deprived them. One who objects and excepts to an erroneous ruling which permits his opponent to present improper evidence does not waive or lose his objection or exception, or his right to a new trial on account of it, by his subsequent introduction of the same class of evidence in support of his case. Russ v. Railway Co., 112 Mo. 45, 50, 20 S. W. 472, 18 L. R. A. 823; Gardner v. Railway Co., 135 Mo. 90, 98, 36 S. W. 214."

See also *Storey v. Green*, 164 Cal. 768; Ann. Cases 1914-b, 961.

While it is true that some of the defendants did refer to the $80,000 loan syndicate stock, which the contract provided was part of the consideration for the loan, as "bonus" stock, this stock was not paid by Italo.

Not a single defendant ever referred to, designated, or intimated that McKeon Drilling Company's stock received by it from the Italo Company as part payment for its assets was paid to them as a "bonus" or a "commission."

It is next urged by the appellee that the Wilkes-Cavanaugh books were not producible by the government but

were by the defendants. These records may have been producible by Wilkes and Cavanaugh, but they were not available to the other defendants whose interests were adverse to those of Wilkes and Cavanaugh, and such other defendants could not have compelled Wilkes or Cavanaugh to produce the same.

IV.

The Court Erred in Sending the Westbrook Affidavit Exhibit 155 to the Jury Room.

1. At page 130 of its brief appellee asserts that there was no prejudice in sending the part of the Westbrook statement which was not received in evidence to the jury room for the reason (1) that it was not prejudicial, and (2) that a part of the same information went to the jury in the Cavanaugh affidavit (Exhibit 277). We shall consider these points in the reverse order. First: It will be observed that the whole of the Cavanaugh statement was received in evidence over the objection of these appellants and that it was received in evidence only as to the defendant Cavanaugh. [R. 538.] The prejudicial error in sending that part of the Westbrook statement not in evidence to the jury room cannot be cured by the specious argument that it was harmless because another prejudicial document was admitted in evidence over objection, and was also sent to the jury room. It will be observed that the Cavanaugh statement was made October 8, 1929, after the alleged scheme was terminated and was therefore only admitted as against the defendant Cavanaugh. The rule which renders the acts and declarations of co-conspirators admissible against all co-conspirators *is re-*

stricted to acts and declarations made or done in furtherance of the conspiracy, in furtherance of the common object and with reference thereto.

Clune v. U. S., 159 U. S. 590; 40 L. Ed. 269;
Wiborg v. U. S., 163 U. S. 632; 41 L. Ed. 289;
Holsman v. U. S., C. C. A. 9, 248 F. 193.

This rule applies whether the acts or declarations are made during or after the termination of the conspiracy, the only difference being that if they are made or done after the conspiracy was terminated they are only admissible as against the declarant.

Logan v. U. S., 144 U. S. 263; 36 L. Ed. 429, and cases cited, *supra.*

Therefore the statements contained in the Cavanaugh affidavit relative to the purchase of a yacht *were not relevant to the conspiracy or scheme to defraud for which the defendants were on trial.* The same observations apply to the Westbrook affidavit relative to the attempt on the part of the appellant Siens to defraud the government of income taxes.

With respect to the statement of Westbrook to the effect that the Shingle syndicate made large profits, it appears that the record [R. 1335 to 1340] does not fully set forth what Westbrook actually said in his statement. An omission appears on page 1339, but inasmuch as the original affidavit is before this court, we shall set forth what Westbrook actually said as follows:

"Q. Do you know, Mr. Westbrook, if the Shingle Syndicate, the purpose of which was to acquire certain oil properties in California for the Italo Petro-

leum Corporation, actually went through? A. Yes. sir, it went through and it is still in existence.

Q. You personally put no money in this? A. No, sir.

Q. Do you consider that large benefits accrued to the members of this syndicate? A. Yes, sir.

(Mr. Weaver.)

Q. What is the basis for your last answer that this syndicate made large profits? A. Why do I believe they made large profits?

Q. Yes. A. Well, the money was raised in the syndicate to pay off the indebtedness of the Italo and assume 12,000,000 shares of the Italo stock and pay off in cash and stock for the various oil properties that the Italo had purchased, leaving a residue of a large number of shares which would belong to the syndicate and if sold ought to return from 5 to 10 to 1. That is not authentic."

We have heretofore pointed out that the statements of appellee on page 133 of its brief that the syndicate purchased Italo stock at $1.16-2/3 per unit at a time when the stock was being sold to the public at a price of $2.00 to $2.50 per unit are not substantiated by the record. While it is true that the syndicate members expected to profit by participation therein it was not proper to permit Westbrook to testify that he considered that the syndicate members derived large benefits therefrom, nor to explain how or in what manner he believed that these large profits were made. Such a statement may have tended to lead the jury to believe that there was fraud in this transaction when as a matter of fact there was none.

The argument on page 134 of appellee's brief that because Westbrook was acquitted and the remaining defendants were found guilty the jury was not prejudiced by Westbrook's statement is specious. The contrary would appear to be true that the jury believed the Westbrook statement as to his connection with the transaction alleged. In so doing they disbelieved the testimony of the other defendants with respect to the same transaction. Instead of showing lack of prejudice this argument shows that the jury was prejudiced by the statement.

V.

Certain Documentary and Oral Evidence Was Erroneously Admitted Over Proper Objection in Violation of the Allegations of the Indictment and Bill of Particulars.

Appellee, page 137 to 139 of its brief, asserts that although various objections were interposed to the introduction in evidence of various exhibits "the record discloses" that the objection on the grounds that the exhibits violated the bill of particulars "was not stated by the appellants as a ground of objection to the most of these exhibits" and particularly with respect to exhibits pertaining to the purchase of the Brownmoor property, and at page 139 appellee asserts that certain record references made by us in our opening brief discloses that in none of those objections was the bill of particulars even mentioned. We made no such statement in our opening brief. Therein at pages 112 to 114 we summarized the transactions alleged in the indictment in which we were excluded from participation by the allegations thereof and by the bill of particulars. This summary included both

the Brownmoor and McKeon transactions. We then stated as follows:

> "At the outset of the trial these appellants objected to the introduction of evidence against them with respect to these transactions upon the grounds that they were not binding upon them [R. p. 222] and continuously reiterated these objections [R. pp. 225, 226, 228, 232-236, 261-264, 268, 269, 270], and when government counsel stated that he was offering evidence to show that appellants Shingle and Brown had 'received some of the secret profits out of the Brownmoor-McKeon deals' these appellants objected, stating 'that the bill of particulars furnished by the government in this case does not claim that Shingle, Brown or Jones were parties to any secret arrangement for the distribution of any of the McKeon Drilling Company stock and defendants were entitled to and did rely upon the allegation and that the government was not entitled to attempt to contradict it.' [R. p. 298.] And this objection was continuously reiterated. [R. pp. 319-320, 344, 345, 346, 350, 353, 373, 374, 410, 448, 450, 454, 455, 460, 482 and particularly at 592 and 593, 607.]"

There are several answers to appellee's contention:

(1) It must be clear that when government counsel was offering in evidence voluminous books of account and records, which in this case amounted to a good sized truck load, defendants could not be advised whether the records contained anything within the issues raised by the pleadings or binding on any particular defendants. Appellants were not advised of the fact that any of the matters contained in the books might be in violation of the bill of

particulars until the district attorney so announced at page 298 of the record, when appellants thereupon objected to the offered testimony upon that ground, that is, that the offered evidence violated the allegations of the indictment and bill of particulars.

The lengthy objection appearing in the record beginning at page 222 was to the minute books of the Italo Petroleum (Exhibits 16 a, b, and c). It included among other grounds an objection that the records were "incompetent, irrelevant and immaterial and not binding on any of the defendants." And upon the further ground as shown at page 223 that the offer was too broad and should be restricted to those parts of the minute book material to the case and "that the district attorney designate the particular parts that may be material in this case and offer them separately." The objection was overruled and an exception taken. [R. 224.] Appellants could do no more than require a segregation and specification of the offered evidence so that they might interpose specific objections to specific items.

They were foreclosed from so doing by the ruling of the court. The same objection interposed to these offered exhibits was in substance reiterated as to Exhibit 17, the minute book of the executive committee [R. 228, 229] and thereupon a lengthy motion to strike each of these exhibits and each page thereof from evidence was made upon the same grounds and others. [R. 232-236.] This motion included the assertion "there is no showing that any of the matters contained in the minutes designated by me are competent or material or relate to any of the matters charged in this indictment or that they can constitute probative value respecting any of those transac-

tions." This motion was denied and exception noted. [R. 236.] It should be observed that these exhibits contain evidence respecting the $80,000 loan and the acquisition of the Brownmoor assets. [R. 238, 239.] Upon the offer in evidence of Exhibits 28-a, b, c, d, 29, 31 and 33, books of account of the Italo Petroleum, a lengthy objection was interposed which appears in the record beginning page 262. This objection included, among other things, "that it does not appear that any of the entries in the books are competent or material or related to any matters charged in the indictment, that they have any tendency to prove or disprove the allegations thereof or that they are in any way within the issues of the case." [R. 264.] This same lengthy objection was interposed to subsequently offered books and records of this company. [R. 267, 268, 271, 272, 273; see objection to Exhibit 63, R. p. 285; see objections to Exhibits 70 and 71, R. p. 292; to Exhibit 77, R. p. 297, on the grounds that it was not "binding upon any defendant except the defendant Wilkes."]

At page 298 of the record, when Exhibit 78 was offered in evidence the appellants were first informed that the district attorney was offering evidence in violation of the provisions of the indictment and bill of particulars and objection was thereupon made upon that ground. [R. 298.] Thereafter objection was interposed to further offered documents on the ground that they were not binding on any defendants [R. 305], to Exhibit 44, the McKeon-Italo contract and its supplement [R. p. 306] and to Exhibits 87-a and "b", certain documents written in long hand by the McKeon Drilling Co. [R. 310], and the same objection was interposed to Exhibit 89, records of

the McKeon Drilling Co., Inc. [R. 314], and thereupon the following motion was made [R. 319]:

> "Thereupon counsel moved the Court to instruct the jury that they were not to consider any testimony pertaining to the execution of the McKeon contract, Exhibit 44, as supplemented by Exhibit 85, *or any testimony of the witness Taylor or any other testimony pertaining to any alleged secret arrangement or agreement* by which some of the defendants were to receive back 2,500,000 shares of the Italo Petroleum Corporation of America stock issued as part of the purchase price of the McKeon Drilling Company assets as against any of the defendants other than those named in the Bill of Particulars as having engaged therein. And that as to those defendants who are named in the Bill of Particulars as having participated therein such testimony could only be considered as against them on a showing that they were at that time parties to the alleged scheme and knowingly participated therein upon the grounds and for the reason that the indictment, page 6, line 23, to page 7, line 4, as restricted by the Bill of Particulars, page 5, paragraph 2, and the indictment page 7, lines 5 to 17 as restricted by the Bill of Particulars, page 5, paragraph 4, and page 6, paragraph O-1 and page 6, paragraph O-2 and the indictment page 7, line 18, as restricted by the Bill of Particulars page 6, paragraph O-3, and the indictment page 7, line 26, as restricted by the Bill of Particulars page 5, paragraph L-5, and the indictment page 7, line 32, as restricted by the Bill of Particulars, page 6, paragraph O-4, restricted the proof of the Government to proving that only eight defendants, to wit: E. Byron Siens, Maurice C. Myers, Paul Masoni, John Perata, James V. Westbrook, Alfred G. Wilkes, John DeMaria and

> Robert S. McKeon had knowledge of and participated in the transactions for the sale of the McKeon assets; had knowledge of and participated in any secret arrangement or agreement for the distribution of 2,500,000 shares of the capital stock of the Italo Petroleum Corporation of America received by the McKeon Drilling Company from the Italo Petroluem Corporation of America as part of the purchase price of the said assets.
>
> Defense counsel further stated to the Court that those defendants who were not named in the Bill of Particulars as having participated in those alleged acts never thought that they would be called upon to meet any charge that they did participate in said transaction."

Thereafter this objection and the objection on the grounds that the offered exhibits were not binding upon any of the defendants was interposed to further documents [R. 331, 332, 333, 335, 338 to 339, 343], and at R. 345 certain letters were objected to

> "upon the further grounds previously stated to the court relative to the offer of evidence *contrary to the specifications of the bill of particulars, and on the ground that said documents could not be competent evidence against any defendant in the action who was not named in the bill of particulars as having participated in the transactions therein designated.*"

This same objection was in substance repeated at pages 346, 349, 350, 352, 353, 356, 358. See also bottom of 373 and top of 374 in which a standing objection was interposed to the testimony of the witness Stratton and all the exhibits and documents identified by him which included testimony respecting the $80.000 loan, the acquisition of the Brownmoor properties by Italo, the is-

suance and distribution of the 600,000 units of stock, the payment of the $83,000 check, the issuance of the 230,000 units of stock and testimony respecting the formation of the Big Syndicate, the execution of the option contract with Vincent and the cancellation thereof. See also the standing objection interposed to the testimony of the witness Vincent [R. 438] pertaining to the same matter. Shingle, Brown & Company records were objected to [R. 448] with respect to transactions violative of the bill of particulars and the same objection interposed to the remaining records of that company [R. 450, 451, 452, 453, 454, 455, 460]. Although this specific objection does not appear to have been interposed to Exhibits 32-a and 32-b, records of the Brownmoor Oil Company [R. 468, 469], such objection was unnecessary as will hereinafter be pointed out. The further objection to offered evidence on the grounds that it violated the bill of particulars appears at pages 482, 511 (which was to the records of the Corporation Commissioner's Office relative to the Brownmoor-Italo transaction) at page 536. The objection to the Brownmoor Oil Company minute book on pages 560 to 561 included among other grounds that it was "outside of the issues of the case and not binding upon the defendants."

These various documentary exhibits were used as the basis for the testimony of the witness Goshorn [R. 589-591] and when Goshorn's testimony and Exhibit 297 prepared by him, purportedly based upon the books and records in evidence, was offered, *specific objection was made upon the ground that the offered exhibit violated the terms and provisions of the indictment and bill of particulars* [R. 592 to 593] and at page 600 it was understood between court and counsel that the objection stood to all

similar questions concerning Exhibit 297. See also R. p. 607. The objection to Exhibit 299, the chart relative to the Brownmoor transaction, included the objection that it was "not within the issues of the indictment" [R. 632].

We think that the above sufficiently disposes of the observation made by appellee and that proper objection was made to the introduction of the various offered exhibits.

(2) It was unnecessary to reiterate the objection to the improper evidence offered on the grounds that it violated the allegations of the indictment and bill of particulars because when improper evidence is first proposed and properly objected to and the objection is thoroughly argued objections to similar evidence need not be repeated.

16 *C. J.*, p. 878, sec. 2201;

People v. Wilmot, 139 Cal. 103;

People v. Castro, 125 Cal. 521;

State v. Shelton, 16 Wash. 590 [48 Pac. 258];

Salt Lake City v. Smith, supra, C. C. A. 8.

VI.

The Court Erred in Admitting Evidence in Violation of the Bill of Particulars and in Failing and Refusing to Instruct the Jury Not to Consider Such Evidence as to Appellants.

In our opening brief, pages 6 to 11, we summarized the allegations of the indictment and pointed out how the indictment restricted its allegations to certain of the defendants, and in some instances included Shingle and Brown and in others excluded them. In so doing we referred the court to the appropriate record page, foot note

reference, and bill of particular reference, substantiating our statements. Appellee in its brief, beginning page 141, challenges our statements in some respects and in so doing departs from the allegations of the indictment and the restrictions of the bill of particulars. Therefore we shall point out to the court that our summary is correct and appellee's erroneous.

1. Appellee's brief, pages 141 to 142, stating that these appellants were among those charged with making the $80,000 loan correctly states what the indictment alleges. (See our opening brief, page 7, par. 1.) Our complaint with respect to this transaction is not that the indictment and bill of particulars did not name us, but that the evidence showed conclusively that we did not make the loan and did not receive a bonus from Italo from the making thereof, and therefore the court erred in failing to so instruct the jury as requested [AE Nos. 70 and 74; R. 1504, 1507]. In substance these requested instructions would have told the jury that the statements of the bill of particulars were not evidence that any defendant participated in these transactions and therefore when the evidence showed they did not so participate the court should have so instructed the jury just as the court instructed the jury that an indictment is not evidence.

(a) That Shingle and Brown did not lend Italo $80,000 as charged in the indictment is shown by the following evidence. The $80,000 loan was made by Shingle as manager or trustee of a syndicate [Exhibit 238; R. 467]. The twenty-five members of the syndicate loaned $80,000 to the syndicate manager, but their agreement was not with Italo [Exhibit 142; R. 383.] (b) If it is claimed that the indictment sufficiently alleges the making of the loan through the syndicate then it is true that Shingle, as an

individual, did subscribe $5000 to the syndicate which he paid [R. 652-3], but Brown did not lend the syndicate anything. He originally subscribed $2500, but his subscription was transferred to O. B. Wilkes, who paid the same [R. 653] and Brown did not receive the 2500 shares of stock represented thereby [R. 653, 887 and 968]. (c) Since Italo did not pay any bonus for the making of this loan the court should have instructed the jury as requested [AE No. 74; R. 1507] for this fact was testified to by the witness Goshorn and stipulated to by the government [R. 651, 654, 649]. We contend, therefore, that these requested instructions, to the effect that the mere fact that the bill of particulars or indictment charged a particular defendant with participation in a transaction was no evidence that such defendant did participate, but that the government was required to prove the participation, should have been given. In as much as the bill of particulars and indictment went to the jury room the court should have given the requested instructions so that the jury would not be misled. The analogy is found in the rule that the court instructs the jury that an indictment is not evidence against the defendant.

2. Appellee's brief, page 142, line 14, states that in the indictment as restricted by the bill of particulars, the terminology "that the said defendants" means "all of the defendants indicted." The indictment, pages 29 to 30 of the record, foot note 5, alleges in this respect "that the said defendants while so dominating and controlling," etc. The bill of particulars is silent as to the names of the designated defendants. It is obvious, however, that this referred only to those defendants who were officers and directors of Italo Petroleum at that time, because John

McKeon had nothing to do with Italo as appellee concedes, and Shingle and Brown not being officers or directors were not dominating and could not dominate the Italo's affairs. Further, this is true because the evidence shows that only the ones named, to wit, Wilkes, Perata and Masoni executed the Italo-Brownmoor contract. (See appellee's brief, pages 9 to 10.) This contention is borne out by the next point.

3. At page 143 appellee asserts "that the defendants Perata, Wilkes, Masoni and Robert McKeon" filed an application to issue the stock to the Brownmoor. (See our brief, p. 8, par. 2.) It is interesting to note that the terminology used in the indictment [R. p. 31, foot note 15], referring to the original indictment [page 4, lines 26 and 27; B/P R. 155, par. 4; subdiv. "h"], designates these defendants as Perata, Wilkes, Masoni and Robert S. McKeon, although the indictment alleges "that the defendants" filed this application. This demonstrates that the use of the terminology "the defendants" does not justify the conclusion that it means all of the defendants. We must consider the whole context [R. 513].

4. Appellee, in the quoted portion appearing on the bottom of page 143 and the top of 144 of its brief, includes Shingle and Brown as those named in the indictment and bill of particulars as issuing the stock to Brownmoor. This is erroneous and a misstatement of the record. This allegation is found in the third paragraph, page 31, of the record, and the terminology "that the defendants" is shown by footnote 16 to refer to the original indictment at page 5, lines 6 and 7. The bill of particulars [R. 155; par 4, subd. "i"], designates "the defendants" as those named in subparagraphs "e" and "f" thereof, which in-

clude Shores, Westbrook, Siens, R. S. McKeon, DeMaria, Wilkes, Perata and Masoni, in other words the officers or directors of the Italo Company who were the only ones who could cause the stock to be issued. That Shingle and Brown had nothing whatsoever to do with the issuance of this stock is clearly shown by the government's own evidence and not disputed. This is shown by the testimony of Ralph Sunderhauf, government witness, and co-transfer agent of the Italo Petroleum who testified at pages 276 and 277 that neither Shingle nor Brown had anything whatsoever to do with the issuance of the stock. We submit, therefore, that the above statement of appellee is erroneous and the requested instructions, the refusal to give which were assigned as errors Nos. 75 and 76 [R. 1507, 1508] should have been given.

5. Appellee at page 144 states that the indictment alleges that "all of the defendants" applied to the Corporation Commissioner for a permit to issue the Italo stock to the Brownmoor Company. The indictment alleges "that the defendants" made the application, not that "all of the defendants" made it. The bill of particulars is silent as to which of the defendants were meant. The assumption of appellee that it meant all of the defendants is no more justified than with respect to the observations contained in paragraph 4 hereof. The evidence [Exhibit 271; R. 511, 512] the file of the Corporation Commissioner shows that the application for the permit was made by the Brownmoor officers to distribute its capital assets and that the permit was issued to that company. Since the bill of particulars was silent and the evidence disclosed that Shingle and Brown had nothing whatsoever to do with these transactions, the court should have given the requested instruction.

6. The statement of appellee, beginning on the middle of page 145 and ending on the top of page 147 is erroneous and does not correctly state what the indictment and bill of particulars allege.

(a) The indictment at the top of page 34 of the record alleges "that it was a part of said scheme and artifice that *some of the defendants* while so dominating and controlling the activities of the said Italo Petroleum Corporation of America, and while officers and directors of the same" should cause the execution of the McKeon-Italo contract. This allegation plainly does not allege that it was part of the scheme of all of the defendants to do this as stated by appellee. The allegations of the indictment are plainly restricted by its own terms to those defendants who were officers and directors of Italo and who were dominating and controlling its activities on July 5, 1928. When the names of those officers and directors were stated we then knew who was meant. The bill of particulars, page 156 of the record, paragraph 4, subdivision ("L") 3 referring to footnote 27 [R. 34] designates those officers and directors as Masoni, Perata, Tomassini, DeMaria, Shores, Siens, R. S. McKeon, Westbrook and Wilkes. This is clearly pointed out in our opening brief, page 10, paragraph 5.

The same observations apply to the last paragraph referred to on page 145 of appellee's brief. The indictment alleged "it was further a part of said scheme and artifice that some of the defendants[31] who were then and there officers of said Italo Petroleum Corporation of America, should and they did have a secret arrangement and agreement, whereby they, these said defendants,[32] should and they did receive back from the said McKeon

Drilling Co., Inc., two million five hundred thousand (2,500,000) shares of said capital stock of said Italo Petroleum Corporation of America, so issued as aforesaid, without the consent or knowledge of the stockholders of said Italo Petroleum Corporation of America and without giving any consideration therefor other than and except the consideration of causing said Italo Petroleum Corporation of America, which they, the said defendants[33] were then and there dominating and controlling, to enter into said agreement and to issue said stock."[34]

As soon as the information was given of the names of "some of the defendants" "who were then and there officers of said Italo Petroleum Corporation of America" we were informed as to who the defendants were who had the alleged secret arrangement and agreement whereby *they and no one else* was to receive this stock without giving consideration therefor "except the consideration of causing said Italo Petroleum Corporation of America, which they, the said defendants [same ones] were then and there dominating and controlling to enter into said agreement and to issue said stock."

If the bill of particulars had attempted to include any defendants other than the officers of Italo as being parties to this secret arrangement and agreement such effort would have been contrary to and done violence to the express allegations of the indictment which, of course, cannot be enlarged by a bill of particulars. But the bill of particulars did not attempt to enlarge the indictment in this respect. It restricted the indictment to those persons whom it named as being officers of Italo Petroleum and dominating its affairs.

Inserting the names of the defendants designated in the bill of particulars as participating in this "secret arrangement and agreement" this paragraph of the indictment reads as follows:

> "It was further a part of said scheme and artifice that some of the said defendants[31] (Siens, Myers, Masoni, Westbrook, Wilkes, DeMaria and Robert S. McKeon) who were then and there officers of said Italo Petroleum Corporation of America, should and they did have a secret arrangement and agreement, whereby they, these said defendants[32] (Siens, Shores, Myers, Masoni, Westbrook, Wilkes, DeMaria and Robert S. McKeon), should and they did receive back from the said McKeon Drilling Co. Inc. two million five hundred thousand (2,500,000) shares of said capital stock of said Italo Petroleum Corporation of America, so issued as aforesaid, without the consent or knowledge of the stockholders of said Italo Petroleum Corporation of America and without giving any consideration therefor other than and except the consideration of causing said Italo Petroleum Corporation of America, which they, the said defendants[33] (Siens, Myers, Masoni, Westbrook, Wilkes, DeMaria, Shores and Robert S. McKeon) were then and there dominating and controlling, to enter into said agreement and to issue said stock."

The following references substantiate the foregoing:

Footnote 31 [R. 34] refers to the original indictment, page 7, lines 5 and 6, which in turn refers to the bill of particulars [R. 156], paragraph 4, subdivision (L) 4.

Footnote 32, *supra*, refers to indictment page 34, which in turn refers to page 7, line 8, of the original indictment.

Footnote 33 [R. 35], refers to page 7, line 15, of the original indictment. [See Bill of Particulars, R. p. 157, subparagraphs (O), 1 and 2.]

The bill of particulars, page 157, paragraph 4, subdivision (O), subparagraphs 1 and 2, states that the terminology "the said defendants" appearing at these places (footnotes 32 and 33) in the record refers to and is intended to refer to the same defendants as are named in (L)-4 hereof, namely, Siens, Myers, Masoni, Perata, Westbrook, Wilkes, DeMaria, and R. S. McKeon. It should be observed that the reference is to subparagraph or subdivision (L)-4, not to subdivision (1)-4 as appellee states in its brief, page 151. It fairly appeared from the evidence that these named persons were officers or directors of Italo. Therefore the bill of particulars by designating the names of these officers or directors designated those persons who were charged in the indictment with having had the "secret arrangement and agreement." The bill of particulars could not specify otherwise without amending the indictment.

7. Appellee in its brief at the top of page 146 states that the indictment charges all defendants except the defendant Lyons with selling the stock and receiving the proceeds therefrom. This paragraph appears in the record on page 35. It clearly is limited by its terms, by the preceding paragraph of the indictment and by the bill of particulars, to the eight defendants named as officers of Italo and could not be otherwise construed. It is obvious that under the indictment the defendants "who . . . sold . . . said stock so received by them under said secret arrangement and agreement as aforesaid"

were the eight defendants who were alleged in the preceding paragraph of the indictment to have had the "secret arrangement and agreement." The indictment, page 35, footnote 36, refers to page 7, lines 19 and 20, of the original indictment. The bill of particulars [R. 157, par. 4, subd. (O)-3] states that "the terminology 'these said defendants' on page 7, lines 19 and 20, of the indictment, refers and is intended to refer to the defendants named in (L)-4 herein." Paragraph (L)-4 designates the eight defendants above named who were officers of the Italo, to-wit, Siens, Myers, Masoni, Perata, Westbrook, Wilkes, DeMaria and Robert S. McKeon.

It is asserted by appellee in its brief, page 149, that this terminology referred to all of the defendants except Lyons, and in support of this assertion, appellee, at pages 150 and 151 of its brief claims that the terminology in the bill of particulars, subparagraph (O)-1 refers to the defendants named in the bill of particulars, paragraph (1)-4, and that the reference (1)-4 was an oversight and error and should have read "paragraph 1, page 1." Appellee might with equal justification have asserted that it referred to paragraphs 2, 3, 4, 5 or 6. Appellee is palpably in error. As above stated, subparagraph (O)-1 of the bill of particulars is a part of paragraph 4 of the bill of particulars, and paragraph 4, subdivision (O)-1, says nothing about the defendants named in subparagraph (1)-4 hereof. It says "the defendants named in (L)-4 hereof" and the same reference is used in subdivision (O), subparagraphs 1, 2 and 3 as (L)-4. Hence the argument falls by reason of appellee's own erroneous statement as to what the record shows.

The trial court on the motion of the government to amend the bill of particulars held that this was the only construction that could be given to the indictment and bill of particulars without doing violence to the allegations of the indictment itself, and denied the motion to amend. [R. 686.] That this construction must be adopted we have heretofore pointed out. The court so construed the indictment as appears from the record. [R. 1273.] But having so construed the indictment and bill of particulars as excluding these two appellants from participation in the so-called secret arrangement and agreement, and the receipt and sale of the said stock, the court nevertheless inconsistently refused to strike or limit the damaging evidence theretofore admitted, and refused the requested instructions to the effect that the jury should not consider such evidence against these appellants. Hence the court's interpretation of the indictment for practical purposes failed to protect appellants' rights. It is for these reasons that the court erred to the appellants' prejudice. (See opening brief of appellants, pages 112 to 127.)

8. Appellee at page 154 of its brief again failed to fully set forth the allegations of the indictment so that the court can ascertain whether it alleges what the appellee claims, and whether the bill of particulars violates the indictment or whether it is consistent therewith.

This paragraph of the indictment appears on the bottom of page 35 and the top of page 36 of the printed record, and obviously must be construed with the paragraph just preceding it and the facts in the case. It refers to the application for and receipt by Italo of a permit to issue its stock for the McKeon assets. This appli-

cation was necessarily made by the Italo officers and signed by Wilkes. [R. 514.] It could not have been otherwise made. With this in mind and remembering that only eight defendants were alleged to be parties to the so-called "secret arrangement and agreement," let us turn to the indictment, record pages 35-36, footnotes 38 and 39.

It alleges that "some of the defendants[38] should, and they did, apply to the Commissioner of Corporations . . . for a permit to issue stock of the Italo Petroleum Corporation of America for the purpose of acquiring and purchasing the properties of various companies, among which were the properties of the McKeon Drilling Co., Inc., and that they, these said defendants[39]" made certain representations to the Corporation Commissioner in such application "then and there well knowing and intending that said McKeon Drilling Co., Inc., should, and it did, receive only 2,000,000 shares of the stock so issued as aforesaid, and that they, these said defendants" should receive the remaining 2,500,000 shares of the stock so issued as aforesaid.

The footnote reference 38, record page 35, refers to the original indictment, page 7, lines 26 and 27, and the parties are named in the bill of particulars, paragraph 4, subdivision (L)-5, record page 157, as the same eight defendants above named as those who had the secret arrangement and agreement and who were officers or directors of the Italo Petroleum Company, plus the defendant Tomassini, who was also a director. The terminology "they, these said defendants" footnote 39 refers to record page 36 and the original indictment page 7, line 32. The bill of particulars page 157, paragraph 4, subdivision (O)-4 designates these defendants as the same nine named in paragraph (L)-5 as above. This para-

graph of the indictment in effect alleges a misrepresentation made by these nine defendants to the Corporation Commissioner. There is no further reference in the record, page 36, disclosing that these nine defendants knew that anyone other than "they, these said defendants" should receive any portion of said stock. Hence appellee's statement on page 154 that the terminology last used referred to all defendants except Lyons is not borne out by the record. Appellee's assumption is that the reference in bill of particulars, subparagraph (O)-5, record page 157 to page 8, line 9 of the indictment means the terminology appearing in the middle of page 36 of the printed record as "then and there well knowing . . . that they, these said defendants", but this assumption does not appear to be justified by the record. Even if appellee's inference could be sustained by the record its conclusion does not follow. Putting the matter most favorably to appellee, and construing their own pleading, the bill of particulars, most strongly in appellee's favor, even though pleadings are construed most strictly against the pleader and allowing for the fact that the appellee had eighteen months to amend and supplement its bill of particulars and did so without changing the foregoing, the paragraph in question merely alleges in substance this: That the nine officers and directors of Italo applied to the Corporation Commissioner for a permit to issue Italo stock in acquiring the McKeon and other assets, and in said application the same nine defendants represented to the Corporation Commissioner that Italo had agreed to issue 4,500,000 shares of Italo stock in part payment for the McKeon assets, when they, the same nine defendants, knew and intended that the McKeon Company would only receive 2,000,000

shares of stock and that the defendants, except Lyons, would receive the remaining 2,500,000 shares. As above stated this paragraph in effect alleges a representation made by nine defendants and, as required by law, in alleging the falsity of a representation, alleges that the defendants making the representation knew that it was false and intended that other persons would receive a portion of the stock. This is by no means an allegation that the defendants other than the nine named officers or directors knew that the representation was made or knew that it was false, or if it was false, wherein it was false, or that they knew that they were to receive any portion of this stock.

The foregoing analysis of the indictment and bill of particulars has been made necessary by reason of the failure of appellee's counsel to fully grasp the scope and effect of the pleadings and thereby falling into error. We submit that the above is plainly and adequately supported by the record and follows from a correct reading of the indictment. Without repeating the argument made in our opening brief on these propositions we earnestly contend that the requested instructions should have been given, and the failure so to do is reversible error. (See our opening brief, pp. 115 to 127.) In passing we point out that appellee does not in its brief challenge the correctness of our legal position nor the authorities cited by us, nor does appellee contend that the case should be affirmed if the indictment and bill of particulars are construed as we contend. Since they are necessarily so construed reversal should logically follow. The District Attorney drew the bill of particulars and the defendants according to their construction of the indictment and bill of particulars as hereinabove set forth had no reason to claim any uncertainty therein, and had "no ace in the hole."

VII.

The Cross-Examination of the Witness Goshorn Was Improperly Restricted.

Appellee states at page 163 of its brief that "at no time either on direct or cross-examination did this witness state that the amounts received constituted a net profit". The record, pages 595 and 597, shows that the witness designated the stock as "bonus stock" and at 598 that the money "was realized" from the disposition of this stock. At page 613 the witness testified "the item of $578,260.63 which I have charged to Shingle, Brown & Company shows on the books of Shingle, Brown & Company. Those books show that the $578,260.63 was taken into the profit and loss account of Shingle, Brown & Company. I think the profit and loss account is here. *It showed all of it as a profit*". And on page 625 he testified "Well, Shingle, Brown & Company received it out of escrow and you could designate it as you like. *There was no consideration paid the escrow.* Those shares were delivered to Shingle, Brown & Company from the escrow upon the order of McKeon Drilling Company and the consideration for that direction from the escrow is not indicated. Q. So that is not properly designated as commissions? A. I will say that you can term it whatever you want to, commissions or not. *Technically, probably* not." And again on the same page. "I do not know what McKeon received from the individuals for the stock shown on the chart as delivered to them. I do not know what he received as a consideration from the individuals for any of the stock that was directed to be delivered from the escrow, except in instances where they are classified as commissions or such." It should be here observed that all of these items were referred to as "bonus" or "commisison" by the witness.

On cross-examination [R. 646-647] the witness was compelled to admit that this stock *was never referred to in the Shingle, Brown & Company records as "commissions" or "bonus"*, and at page 664 the witness testified "with reference to the items appearing on Exhibit 297 and to the item there "Shingle, Brown & Company $578,260.63, *I testified that that was net*".

It must be apparent that the witness testified that this money was received as a net profit without giving any consideration therefor and was a bonus or commission, whereas the appellants by their cross-examination sought to prove that the books and records in evidence disclosed that costs, expenses and appropriate charge for services and other items were properly chargeable against this sum. [R. 669.] It should be further observed that in giving the testimony that no consideration was received or evidenced by the books that the witness was testifying to a negative matter which was improper under the rule enunciated by this court in the recent case of *Shreve v. United States*, decided April 29, 1935.

VIII.

The Twelfth Count of the Indictment Did Not Allege a Public Offense Within the Jurisdiction of This Court.

Appellee asserts page 203 that "unquestionably counsel for Shingle and Brown would have objected to the indictment if it did not state the manner in which the defendants caused the delivery of the letter at Los Angeles, California."

In this connection the attention of the court is called to the demurrer appearing on page 138 of the record wherein

a demurrer for lack of jurisdiction was interposed on this very ground, and also to the motion for an instructed verdict of not guilty [R. 690] upon the grounds of lack of jurisdiction. Appellee in its brief at page 209 concedes that the court did not instruct the jury that before they could find the defendants, or any of them, guilty they must find that the letter pleaded in the twelfth count of the indictment must have been knowingly caused to be delivered by mail at Los Angeles, California, according to the direction thereon. That appellee asserts that in as much as the court referred the jury to the indictment this was a sufficient instruction upon this point. *The rule is that an instruction is erroneous* which assumes to state all the elements of the crime but omits one or more of them, or *which refers the jury to the indictment or information to ascertain any of the essential elements.*

See:

16 *Corpus Juris*, p. 968, sec. 2632.

The instruction given by the court in this respect was as follows [R. 1269 and 1278]:

> "The indictment in this case, as amplified and rendered definite by the bill of particulars furnished by the Government, charges:" [R. p. 1269]

and the court then proceeds to summarize its interpretation of the alleged scheme to defraud, and thereupon on page 1278 of the record proceeds to instruct the jury as follows:

> "The twelfth count of the indictment charges that the defendants on or about the 23rd day of January, 1929, for the purpose of executing the scheme described *placed in the United States Postoffice at San Francisco*, a postpaid envelope addressed to O. J.

Rhode at Los Angeles, containing a certain letter dated January 23, 1929, and which has been admitted in evidence as Exhibit No. 234".

And again at page 1280, the court instructed the jury as to the two elements of the offense, the second of which was "for the purpose of executing such scheme or artifice or attempting so to do, *place or cause to be placed* any letter, circular, or advertisement in the Post Office to be sent or delivered by the Post Office establishment". It is, therefore, clear that the court was instructing the jury under the *mailing provisions* of the statute. Appellants did take exception to the instruction of the court relative to the use of the mails in the manner alleged in the indictment. This whole instruction is set forth in the record at page 1282, and includes the reference to mailing by employees or clerks of defendant. At page 1327 of the record we took exception to this instruction in the alternative form by excepting to the instructions saying "That because Your Honor was referring to a portion of the statute under which the indictment is not brought, and if that were the portion of the statute under which the indictment were brought, *this Court would have no jurisdiction*". We submit, therefore, that the matter was sufficiently called to the attention of the court, and that even in the absence of an exception to the instructions of the court it was the duty of the court to instruct the jury as to all of the elements of the offense.

Conclusion.

We are not attempting to be over critical of learned counsel for appellee, who are "strangers to the record" not having participated in the trial of the cause. We well understand how, because of the complicated nature of the proceedings in the court below, it is most difficult for third parties, whether advocates or judges, to clearly grasp the scope of the pleadings and evidence and their application to the facts and law. In all of its aspects this case presents a clear case of separate, disconnected transactions having no legal connection, except possibly upon the theory that because one or two defendants were connected with one transaction and others with another, and still other defendants with another transaction, one single transaction was shown. Such a situation was very clearly denounced by the Supreme Court in the recent case of *Berger v. United States*, decided April 15, 1935, 79 L. ed. Advance Opinions, page 667. In that case the Supreme Court held that variance between an indictment charging a single conspiracy and proof of several conspiracies is material where it has substantially injured the defendant.

In the present case *it was charged that the scheme was to induce the persons named as "the persons to be defrauded" to purchase stock of Italo American and Italo Petroleum corporations*, by the means referred to as "parts." That the evidence failed to establish the charge as to appellants Shingle and Brown, is clearly demonstrated by the following recapitulation.

1. None of these named "persons to be defrauded" purchased stock in either corporation by reason of any act or representation made directly or indirectly by Shingle or Brown and as a matter of fact none of the said per-

sons purchased stock from any of the appellants. Each of the persons named as "persons to be defrauded" already owned stock in corporations whose assets or stock was acquired by Italo American or Italo Petroleum and thereby became stockholders in the Italo corporation [Witnesses: George J. Geis, R. 539; Grace Dennison Keating, R. 541; Leo Willman, R. 551; J. H. Hudspeth, R. 553; Emma Riniker, R. 555], or such persons acquired their Italo stock by inheritance from decedents holding stock in merged corporations [Witness: LaVinna Hopkins, R. 547], or such persons were "dabbling," "gambling," or "speculating," or "taking flyers in the market" [Witnesses: George Gartner, R. 487; J. J. Biagina, R. 492-3].

The remaining witnesses purchased their stock from stockbrokers or from Frederic Vincent & Company.

It is apparent that none of those persons was induced to purchase Italo stock by reason of any of the matters alleged in the indictment or the conduct of these appellants.

The following persons named in the indictment as "the persons to be defrauded" all acquired or owned their Italo stock by inheritance, exchange or purchase *long before;* the Italo American-Italo Petroleum merger, *before* the $80,000 loan, *before* the Brownmoor purchase, *before* the "Big Syndicate," *before* the McKeon purchase, and *before* receiving any literature issued while these appellants were connected with Italo. Obviously therefore, they were not, and could not have been, "solicited to purchase," and did not "purchase" their stock in said companies by reason of the scheme alleged in the indictment or the conduct of appellants [R. p. 27]; neither did they "part with their money and property" by means of the alleged representations made *after* they had acquired their stock.

(a) George Geis, the indictment witness Count 3, acquired California Refining Company stock in 1922 or 1923 and received Italo stock in exchange when the companies merged. He "did not buy it because of any statement made by any defendant . . . or any letter or other circular that was sent through the mails by any defendant in this case." [R. pp. 539-541.]

(b) Grace Keating, indictment witness Count 2, owned Modoc Petroleum Corporation stock and received Italo Pete stock in exchange, on the merger. *After the exchange* she received literature, including the count 2 letter. [R. pp. 541-542.]

(c) La Vinna Hopkins, indictment witness Counts 6 and 8, acquired her Italo stock by inheritance from her brother who owned stock in the Coalinga Oil Company when he died *August 7, 1917*. This stock was exchanged for Italo stock when Italo purchased the Coalinga Company's assets. Thereafter she received the letters. [R. pp. 547-551.]

(d) O. J. Rohde, Count 12 witness, was a "Big Syndicate" member. He purchased stock from the International Securities Company, the date not being given. This letter however related to Syndicate affairs. It was not in furtherance of the alleged scheme. [See R. pp. 577-583 and opening brief pp. 182-185.]

(e) None of the remaining witnesses, who testified they purchased or acquired Italo stock, did so by reason of any representation of appellants. In general, they acquired their stock in the same manner as the other witnesses. [See Willman, Count 14 witness, R. p. 551; Hudspeth, Count 9 witness, R. p. 553; Riniker, Count 11 witness, R. p. 555, and Anderson, Count 1 witness, R. p. 586 Ap-

pellants were acquitted by dismissal or verdict on these counts.]

In view of the foregoing it is difficult to understand: how any of these persons were defrauded, or could have been defrauded, by any conduct of the appellants, or the alleged representations, or the justification for appellee's assertions that "the guilt of appellants was overwhelmingly proved by the evidence," or "it was their (defendants) criminal desire to enrich themselves by defrauding this company, its stockholders" who were enticed to purchase stock with their "hard earned money" and were thereby "fleeced." The charge in the indictment must be proved as alleged, which was not done. These assertions are plainly not supported by the evidence. For failure to prove the charges alleged the cause should be reversed as to these appellants.

2. Italo American did not illegally pay dividends, but if it had, the only defendants involved therein were Perata and Masoni, as all dividends were paid before Wilkes became a director of Italo American. [R. 197.]

3. There is no relation between the payments of dividends by the Italo American and the $80,000 loan, or the Brownmoor purchase, or the McKeon purchase, or the Big Syndicate, unless, because Perata and Masoni were connected with these various transactions. This is insufficient. See *Berger v. United States, supra.*

4. Shingle as a third party unconnected with the various oil corporations was perfectly justified in participating in the $80,000 loan syndicate as manager. He was not an officer or director of Italo and that company repaid the loan with seven per cent interest. Even though a bonus had

been exacted from and paid by Italo this was not a "wrongful" or "fraudulent" act, but at the most might have been usury under some state law. Usury, however, does not involve fraud, but is only made illegal by statutes in many states.

5. Vincent & Company, Italo's fiscal agents, admittedly acquired or controlled 950,000 of the 1,000,000 Brownmoor shares, knowing of the probable Brownmoor asset purchase by Italo. They could dispose of this stock and the profits therefrom as they saw fit. Vincent and Stratton admit they dealt solely with Wilkes and not with Shingle or Brown. [R. 425.] Since Vincent & Company already owned 950,000 shares of Brownmoor stock, they did not buy 230,000 of those same shares a second time from Shingle, Brown & Company. The 230,000 shares of stock was receipted for and received by Vincent who caused its issuance in Shingle's name and forged Shingle's name to the receipt. [Exhibit 38; R. 443; see also Exhibit "E."] The distribution of this stock was in accordance with "our understanding," that is, an understanding between Vincent & Company and Wilkes. [Exhibit 171; R. 405.] These allegations of the indictment were definitely refuted. But had they been true no criminality attached to Shingle or Brown because they committed no fraud. Neither the Brownmoor nor the Italo stockholders were defrauded by the sale of the Brownmoor assets to Italo.

6. The "Big Syndicate" was and is a common financial underwriting set-up. It performed its obligations and neither Shingle nor Brown was guilty of any fraudulent act because they subscribed money to the syndicate and lost it. This was a legal transaction and even the

officers and directors of Italo could legally and properly become syndicate members.

Castle v. Acme Ice Cream Co., 101 Cal. App. 94 at 101;

Schnittger v. Old Home, etc. Min. Co., 144 Cal. 603, at 606;

Stensgard v. St. Paul Real Estate Co., 50 Minn. 429, 17 L. R. A. 375;

2 *Thompson on Corp.*, 3d Ed., Sec. 1352.

See Record pp. 1543-5.

And the court therefore erred in refusing to give the requested instructions assigned as errors 114 and 115. [R. 1543 to 1545.]

7. Vincent & Company, which had agreed to sell the Big Syndicate stock and finance the cash payments on the properties, defaulted in its obligations, and by means of threats, obtained from John McKeon 250,000 shares of the McKeon stock. By reason of this disaster it was necessary for someone to step into the breach and attempt to raise the finances and this Shingle and Brown agreed to do. It was necessary that money be raised to save for the Italo stockholders the valuable properties being acquired, and the moneys already paid thereon. These properties, particularly the McKeon properties, are the principal oil producing properties of Italo today. [R. 850.] Instead of being a fraud on Italo the financing was a benefit to the "persons to be defrauded." The 450,000 shares of Italo stock paid to Shingle, Brown & Company as compensation for the services rendered was paid by the McKeon Company, the owners of the stock.

It was not charged or proved that it was paid pursuant to any "secret arrangement or agreement." Since it was not charged these appellants were in the dark and completely taken by surprise when the government announced that it expected to repudiate the indictment and its own bill of particulars. [R. 298, 320, 592.] They were unprepared to meet the charge and the indictment and bill of particulars served as a "mere snare or delusion" and they were denied a fair and impartial trial.

8. Without dispute it was shown that the properties acquired by Italo were worth far in excess of the consideration paid. [See R. 705 for the Brownmoor properties and R. 526-7 for the McKeon properties.] All that can be said for the government's case is that unforseen conditions arising in the oil business in 1929, followed by the world-wide depression, resulted in a charge of criminal fraud. [See testimony of Ralph Arnold, R. 782 *et seq.*]

9. The sole basis of the government's charge is the inference that because certain McKeon stock was distributed to some of the defendants on and after January 24, 1929, that there was a previous secret agreement to that effect between them. The rule is that proof of the existence at a particular time of a fact of a continuous nature gives rise to a presumption that it exists at a subsequent time, *but there is no presumption that the fact had previously existed.*

16 *Corpus Juris,* p. 539, Sec. 1016;

State v. Dexter, 115 Ia. 678 [87 N. W. 417];

Petroff v. United States, C. C. A. 6 [13 F. (2d) 453].

Presumptions do not run backward and there is no retroactive evidentiary inference.

10 *Ruling Case Law,* Sec. 15, p. 873;

22 *Corpus Juris,* p. 92, Sec. 30;

Corbin v. United States, C. C. A. 6 [181 F. 296].

We earnestly and sincerely contend that a fair consideration of the evidence as to appellants Shingle and Brown and a just appreciation of the proceedings had at and before the trial of this cause can result in no conclusion but that appellants were prejudiced by the errors committed by the court and herein assigned and argued as error; that they were denied a fair and impartial trial to which they were entitled and that this cause should be reversed.

Respectfully submitted,

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W. E. Simpson,

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